No. 44300-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In re the Marriage of:

WENDY L. TATE,

Respondent,

and

GREGORY E. TATE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE JAMES ORLANDO

APPELLANT'S RESPONSE TO CROSS-APPEAL AND REPLY

By: Edward J. Hirsch
WSBA No. 35807
Law Offices of Edward J. Hirsch, PLLC
93 South Jackson Street, Suite 33995
Seattle, WA 98104
(206) 434-6682

Attorney for Appellant

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I. Introduction

The trial court, explaining the basis of its decisions, connected the parties' marriage, "use of Tate Lake," the children, with the "damaged created" by Greg's "power and control" and "domestic violence:"

> Dear Counsel:
>
> The saga of Greg and Wendy Tate parallels the use of Tate Lake; two people in a boat on a manmade lake going nowhere. It is unfortunate that they were not able to address their issues in counseling, as so much damage has been done to their children in the process. This is a case about power and control, domestic violence and the damage created. CP 381.

The trial court's condemnation of Greg is reflected throughout its consistently punitive decisions, which include:

- Allowing him to see his kids only eight hours every two weeks with the illusion of increasing this time;
- Imposing excessive, duplicative, and unnecessary protection and restraining orders on him;
- Awarding Wendy maintenance based on findings that she was just a stay-at-home mom, while finding that she acquired a community interest in Tate Lake by running the lake rental business;
- Awarding her 100% of either party's interest in Tate Lake and estopping Greg from asserting any interest in it merely because he claimed that that the property belonged to his father; not to them.

Viewed individually, these orders are rife with errors and, as a whole, they are an improper reaction to Greg's alleged marital misconduct, requiring reversal and remand for fair consideration by a new judge.

II. Response to cross-appeal & reply to response brief at 48

Wendy should not be awarded attorney's fees, either in the court below or on appeal. The trial court found that both parties were intransigent; it just found that Greg was "significantly more intransigent" than Wendy. CP 187, 383. She does not assign error to this finding. Unchallenged findings of fact are verities on appeal. Marriage of Akon, 160 Wn. App. 48, 57, 248 P.3d 94 (2011). The court disapproved of how they both made Tate Lake a "priority," calling it "the detriment of their marriage" and also how they both made the case more "complicated" and outrageously "expensive:"

> Each party chose their course of action in this case. It was made more complicated buy their action . . .each side has had their fees paid by their parents up to this point, which may have fueled some of this litigation. It should not cost $300,000.00 to get your marriage dissolved. I cannot justify the fees involved by awarding them to either side." CP 187, 383.

Given her own intransigence, it is incredible that Wendy would ask for an award of an additional $150,000 in fees on appeal. ***See*** Resp. Br. at 15; CP 614; RP 9/26 at 123.

The trial court framed its fee award in part on the parties' relative economic circumstances; however, in light of the unchallenged finding that Wendy's fees were paid by her mother, this expense did not affect her income or financial resources. RP 9/19 at 60, RP 9/21 at 5-6. It is an

abuse of discretion for a court to award attorney fees under RCW 26.09.140 to a party who has the ability to pay. Marriage of Foley, 84 Wn. App. 839, 846, 930 P.2d 929 (1997).

In any event, Greg is unable to her fees, either at the trial court level or on appeal. He has nothing left each month after paying his expenses, child support, and maintenance, not including his obligations for 62% of his kids' extracurricular activities and uninsured medical costs, reconciliation counseling, martial debts and judgments in Wendy's favor. CP 156, 160-167, 185-188, 382-383, Ex. 78, 85, 86.

In addition, Greg's appeal was not the result of intransigence. It was due to the fact that the trial court's orders cut him out of this kids' lives and awarded Wendy an interest in the property that his father generously bought and funded so that they could recreate there as a family, among other valid concerns. His appeal certainly is not sanctionable as frivolous under RAP 18.9(a), as he has raised debatable issues such that his claim is not devoid of merit. Marriage of Adler, 131 Wn. App. 717, 729, 129 P.3d 293 (2006).

Wendy's request for attorney's fees in her cross-appeal and also on appeal should be denied.

III. Reply Argument

A. Maintenance is based on conflicting, unsupported findings

The trial court's findings that Wendy needs maintenance because she had merely been a "stay-at-home mother" which "resulted in her decreased earning potential" (CP 177, 382) directly conflicts with its findings that she "spent countless hours working to improve, promote and maintain the Tate Lake properties," which supported its decision that the community had an interest in them. CP 179, 187, 382.

These findings were entirely based on the testimony of Wendy, her friends and family members that she had "a full-time job" as "a manager of Tate Lake" from "1996 to present" with "full control" over "promoting the business," managing rentals, and "planning tournaments," among other things. RP 9/18 at 159-160, 9/19 at 46-49, 95, 118, 9/20 at 39-43, 9/21 at 19, Ex. 20, 46, 82. ***See*** Resp. Br. at 14. She had prior experience as a "buyer" and "manager" for MasterCraft Boat Company from 1988 to 1995, according to her own evidence, so that, combined with her alleged 15 years at Tate Lake, she claimed that she had a total of 23 years of experience in the water ski industry. Ex. 20, RP 9/19 at 94, 9/21 at 20.

Wendy did not offer evidence about what she could earn in the water ski industry or that she was only able to earn $12 as a para-educator, a job she stopped in 2002, so the finding that she had a "decreased earning potential" is not supported by the evidence. RP 9/19 at 93; Ex. 20.

Greg did not disagree with Wendy's decision to take a new career direction; however, since she testified that she was eligible for financial aid and grants, she should rely on these funds. RP 9/19 at 185. He cannot afford to pay $2,000 a month in maintenance when he has only $1,584 remaining after paying his own expenses and child support, not including 62% of the kids' extracurricular activities[1] and uninsured medical costs, reconciliation counseling, plus the debts and judgments imposed on him. CP 156, 160-167, 177-178, 185-188, 382-383, 398, Ex. 78, 85, 86.

Wendy cannot have it both ways. The maintenance award or the community interest in Tate Lake (or both) are based on conflicting findings unsupported by substantial evidence. In any event, the fact that Wendy did not need maintenance, while Greg cannot afford it shows that the award was not based upon a fair consideration of the statutory factors and constitutes an abuse of discretion. Marriage of Crosetto, 82 Wn. App. 545, 558, 918 P.2d 954 (1996).

B. The trial court improperly delegated its authority

Wendy correctly observes that the appointment of Dr. Huddlestone means that Greg's only way to request more residential time is to file a petition to modify the parenting plan under RCW 26.09.260(9). This is

[1] Wendy listed the cost of the kids' extracurricular activities as $1,525.55 in June 2012 and $3,125.13 in July and August 2012 for an average of about $1,550 a month. Ex. 85, 86.

because Dr. Huddlestone's refusal to act as an "impartial" and to inform the trial court "when counseling is complete" effectively made the interim residential schedule into a permanent one. RP 9/25 at 163.

This is a perfect example of a trial court's abdication of its ultimate authority to permanently determine a parent's residential schedule and completely unlike the delegation of "only the power to act in a temporary fashion" along with the right to "request immediate review" that was approved of in Kirshenbaum v. Kirshenbaum, 84 Wn. App. 798, 801, 929 P.2d 1204 (1997).

In addition, the appointment of Dr. Huddlestone lacks support in the GAL's reports or anywhere else in the record. On the contrary, the GAL was against it. He warned that "Dr. Huddlestone is not a parenting plan supervisor and as a therapist if she gets into a decision-making role she loses her ability to be useful to the entire family." Ex. 16 at 6. He was right. The temporary parenting plan authorized Dr. Huddleston to change the residential schedule, the reconciliation process stalled, and remained that way, even though Greg visited with Dr. Huddlestone and followed her instructions to attend treatment and accept minimal contact with the kids. Ex. 13 at 6, 11-12, 15 at 3. As a remedy, the GAL recommended that Dr. McCollum conduct reconciliation counseling and decide when Greg's time should be expanded. RP 9/18 at 83, Ex. 12 at 7-8.

The trial court's appointment of Dr. Huddlestone was particularly disturbing because of its refusal to correct its error even after Greg asked for reconsideration. CP 213, Greg Tate Response 11/28/12 at 2-8, Gregory Tate Reply 11/29/12 at 1-1. This impermissible delegation of authority, without support in the record, was a manifest abuse of discretion.

C. RCW 26.09.191 restrictions are not supported by the record

1. Restrictions under RCW 26.09.191(3)

Wendy concedes that Greg did not engage in "abusive use of conflict which creates the danger of serious damage to the children's psychological development" after separation; however the GAL did not report such behavior by Greg before separation either. Generally, a court finds the abusive use of conflict where one parent inserts the child into a parental conflict, which could psychologically damage the child. Marriage of Burrill, 113 Wn. App. 863, 872, 56 P.3d 993 (2002). For example, if the parent makes unsubstantiated reports about the other parent's improper conduct or falsely claims that the children hate going to the other parent's home, the court can find abusive use of conflict. Id. at 868-70. Here, Greg and Wendy may have had conflict between them, but there was no evidence that engaged in these types of behavior, using the kids.

The trial court based its decisions about the other restrictive factors under RCW 26.09.191(3) on the GAL's reports. CP 151, 156. The GAL

did not find that Greg had an "absence or substantial impairment of emotional times between [himself] and children;" rather, he specifically recommended reconciliation counseling followed by expanded residential time because he was still considering possible reasons for the difficulties in the relationship that were not caused by Greg, including Wendy's influence on them. Ex. 13 at 11-12.

The GAL did not find that there was "neglect or substantial nonperformance of parenting functions;" on the contrary, he "found no evidence whatsoever of a detrimental environment" in Greg's home and that Greg continually made efforts to get "back into the lives of the kids." Ex. 12 at 5; 13 at 6. The GAL just did not view neglect as an issue.

Even if these restrictive factors were supported by substantial evidence, the GAL specifically did not find that Greg's "involvement or conduct" caused the restrictive factor, a requirement for a finding under RCW 26.09.191(3) that Wendy does not address. Ex. 13 at 11, Marriage of Watson, 132 Wn. App. 222, 233, 130 P.3d 915 (2006).

2. Restrictions under RCW 26.09.191(2)

Greg stands by this argument in his opening brief that substantial evidence does not support the findings of "physical or a pattern of emotional abuse of the children" and "a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault which causes

grievous bodily harm or the fear of such harm." CP 151. At most, he and Boone had a "contentious relationship," but his behavior was not domestic violence. Ex. 12 at 3.

D. The protection order allows Wendy to modify the parenting plan

Wendy already has "an avenue to pursue modification" under RCW 26.09.260; yet the protection order explicitly allows her to bypass the requirements of that statute, including showing a substantial change in circumstances, and further limit Greg's contact with the kids at any time in the next 10 years. CP 144. The protection order functions as a de facto modification of the parenting plans and must be reversed.

E. Restraining and protection orders were unnecessary and punitive

The trial court's issuance of a restraining order and also a protection order, largely duplicative, totally unnecessary, and extremely punitive, were a manifest abuse of discretion.

1. Restraining orders were unnecessary

Wendy does not even attempt to support the restraining orders. CP 146-149. This is because such orders are required to be "necessary" under RCW 26.09.060 and here they are not, as Greg described in his opening brief. Its only purpose was to punish him for his alleged past

2. The record does not support a finding of domestic violence

There was insufficient evidence to support a finding that Greg committed domestic violence under RCW 26.50.010 against Wendy, as he argued in this opening brief. There was no evidence that Greg inflicted "physical harm, bodily injury, or assault of her. CP 141. Wendy mainly claimed that she feared him because he was verbally abusive. This is what the kids told the GAL as well, which formed his opinion that was "more likely than not" there was domestic violence "more emotional than physical but no less frightening for that fact." Ex.12 at 6. Wendy's testimony about Greg throwing down a bottle of beer and an axe blade was about an outburst of anger or frustration, but not an attack on her. RP 9/20 at 13. Her testimony shows that he may have inflicted the fear of imminent verbal abuse on her, but not of imminent physical harm, bodily injury or assault, as required by RCW 26.50.010. Accordingly, the protection order should be reversed.

3. Even if the finding of domestic violence could be sustained, the restrictions are unreasonable

Wendy also relies on Spence v. Kaminski, 103 Wn. App. 325, 12 P.3d 1030 (2000), which, in fact, supports Greg's position. In that case, the court, affirming the issuance of a permanent protection order, concluded that none of its restrictions "are unreasonable if based on a

demonstrated need to protect Ms. Spence from domestic violence," even if the majority of Mr. Kaminski's acts were not recent. Id. at 331-332.

Here, there was not a "demonstrated need" to protect Wendy from domestic violence, as the record shows that after separation Greg did not do any of the acts he was accused of. Instead, he took responsibility for the fighting and enrolled in domestic violence evaluation and treatment, as recognized by the GAL. RP 9/18 at 80-81, Ex. 12 at 8; 13 at 11.

Wendy did not even believe that she needed a protection order. She voluntarily dismissed her petition for one at the start of the case and did not renew her request for one at trial. CP 311, 351. Instead, the trial court issued it sua sponte, on top of the restraining order with the same provisions. CP 141-145, 311.

Without the "demonstrated need," the extensive restrictions in the protection order were "unreasonable" and should be reversed or at least remanded for consideration of reasonable provisions.

F. The trial court improperly considered marital misconduct in making its property award

The trial court, in explaining its reasoning, specifically connected the parties' "use of Tate Lake" with "domestic violence," "abuse and control" by Greg. CP 381. In doing so, it "went beyond looking at the

parties' economic circumstances and impermissibly assigned fault" to Greg for marital misconduct.

The property award was a windfall to Wendy and a punishment of Greg. On top of everything else, Wendy was awarded "any and all interest that either party holds" in Tate Lake Rentals, LLC, Tate Farms, LLC, and Tate & Sons, LLC, including the real property and personal property owned them ("Tate Lake"), which she estimated was worth between one and two million dollars, while Greg was estopped from "asserting any interest" in them. CP 175, 183-184, 188, 382, RP 9/18 at 7.

The 80/20 division of about $100,000 in net assets between the wife and the husband in Urbana v. Urbana, 147 Wn. App. 1, 195 P.3d 959 (2008) pales by comparison. And, in that case, the trial court, in making its division, discussed the post-decree economic situations of the parties and merely "commented on" the husband's marital misconduct. Id. at 14.

This punitive decision certainly was not "the inevitable legal consequences" of Greg merely claiming that "the parties have no community interest" in Tate Lake, as it does not resemble the husband's position in Marriage of Wallace, 111 Wn. App. 697, 45 P.3d 1131 (2002). In Wallace, "the inevitable legal consequences" of the husband's brazen admission that he fraudulently transferred community real property to his father, and, therefore, he no longer owned it, was the award of the

property entirely to the wife at zero value in order to prevent him from taking unconscionable advantage of his own financial wrongdoings. Id. at 703-708. Here, there were no findings or evidence that Greg engaged in financial misconduct. Without more, this harsh decision cannot be described as "just and equitable," under RCW 26.09.080, and must be the result of the improper consideration of marital misconduct.

G. Equitable estoppel does not apply prospectively

Equitable estoppel prevents a party from asserting a claim that "contradicts or repudiates" a prior "admission, statement, or act" that another party relied on and would otherwise suffer an injury as set out in the case Wendy cites, Bd. of Regents of Univ. of Washington v. City of Seattle, 108 Wn.2d 545, 551, 741 (1987). Here, the doctrine does not apply because Greg has not asserted a claim that "contradicts or repudiates" his claim at trial that he and Wendy did not have a community interest in Tate Lake, instead, he was prospectively estopped from claiming or even receiving an interest in Tate Lake on any grounds. Since he has been blocked from making any claim to an interest in Tate Lake, let alone a contradictory one, Wendy will never rely on it to her detriment.

Even if the doctrine did apply, what Wendy calls an "injury" is the risk that that her windfall of "all interest that either party holds" in Tate Lake may be reduced if Greg was allowed to take any position adverse to

hers in the pending case. She also calls the extent of her attorney's fees an injury, but she brought that on herself by excessive spending and litigation, as shown in the unchallenged findings. CP 179, 383.

H. Greg has standing

Greg has standing to challenge the trial court's decisions regarding Tate Lake and the promissory note as an "aggrieved party" under RAP 3.1, much like the real estate broker in Temple v. Feeney, 7 Wn. App. 345; 499 P.2d 1272 (1972). In that case, after the sellers of a motel dismissed their appeal of an order rescinding the sales contract, their broker, as the sole appellant, was still entitled to review because the trial court's ruling that he "took part in fraudulent inducements was particularly damaging to him" as was its order that he transfer title to the real estate he received as his commission. Id. at 345-347.

Similarly, Greg, who has a public reputation in competitive tournament waterskiing and in renting a private ski lake, was damaged by the comparison to the husband in Wallace. The trial court's decisions about Tate Lake forces him to defend himself in the pending case and may impair or extinguish his right to use the property. Its decision about the promissory note violated Greg's due process rights since the court repeatedly ruled it would not consider whether the promissory note was enforceable, yet, in the final orders, did so, without allowing him "a

reasonable opportunity to contest and explain." Watson v. Maier, 64 Wn. App. 889, 900, 827 P.2d 311 (1992). Consideration of the promissory note may have changed the division of property and debts, thereby affecting his pecuniary rights as well.

I. The determination of a third party's rights was improper

The trial court disestablished part of John Tate's rights by finding a community interest in Tate Lake and awarding that interest to Wendy, even if the value will be determined later. This is unlike Wallace where the husband's father did not have a right to the parties' community real property because the husband had fraudulently quitclaimed it to him, violating RCW 26.16.030(3), even though the dissolution court lacked the authority to set aside the transfer. Wallace, 111 Wn. App. at 697.

The trial court extinguished John Tate's rights in the promissory note by ruling its enforcement was time-barred, whereas in Wallace, the court actually enforced the husband's father's judgment, ordering the husband to pay it, as he had fraudulently consented to its entry. Id. at 704.

These impermissible adjudications of a third party's rights must reversed. Marriage of Soriano, 44 Wn. App. 420, 722 P.2d 132 (1986).

J. The finding of a community interest in Tate Lake is not supported by substantial evidence.

1. Wendy did not purchase an interest in Tate Lake for $500

The trial court did not find that Wendy purchased a community interest in Tate Lake with the earnest money check for $500 and such a finding would not be supported by substantial evidence since John Tate clearly reimbursed her with a check for this for this amount. RP 9/19 at 131, 9/21 at 42, Ex. 96. John Tate used only his funds for the original purchase and the buyout of the Bonneys. The presumption is that it is the community property of John Tate and his wife. Marriage of Skarbek, 100 Wn. App. 444, 451, 997 P.2d 447 (2000).

2. Substantial evidence does not support the finding that John Tate intended to form a partnership

There must first be an intent to form a partnership before a person can acquire an interest in it, whether by contributing cash or labor, as shown by the case Wendy relies on, Fields v. Andrus, 20 Wn.2d 452, 148 P.3d 313 (1944). In Fields, the trial court considered whether the father "intended to form a partnership with his son" and, after finding evidence that he did, next considered whether the son acquired his interest by contributing labor or by gift. Id. at 453-454.

John Tate's "statements," "behaviors," and the "documents he created" do not support a finding that he intended to form a partnership with Greg and Wendy or to treat them as partners in a "business for profit:"

> "Partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055, predecessor law, or comparable law of another jurisdiction." RCW 25.05.005(6)

Where there is no express partnership contract, as in this case, the existence of a partnership depends upon the intention of the parties. Malnar v. Carlson, 128 Wn.2d 521, 535, 910 P.2d 455 (1996). Facts gleaned from the conduct of the parties are preferred over anything the parties have said. Eder v. Reddick, 46 Wn.2d 41, 49, 278 P.2d 361 (1955). Circumstantial evidence does not tend to prove the existence of a partnership, unless it is inconsistent with any other theory. Id.

All alleged partners must voluntarily consent to the formation of a partnership. Ferguson v. Jeanes, 27 Wn. App. 558, 564, 619 P.2d 369 (1980). A party asserting the existence of a partnership bears the burden of proof by a preponderance of the evidence. Eder, 46 Wn.2d at 48-49. This evidence must be stronger where the dispute is between alleged partners rather than with a third party. Id. at 49

Exhibit 107 shows that John Tate clearly did not intend a business for profit or even a prudent investment in buying Tate Lake; he intended to support his son's love of gathering there for waterskiing with his family and friends. In his letter to Wendy and Greg in October 1999, when he was in his 70s, John Tate to memorialized their agreement that if he

bought out the Bonneys, they would "stay on top of maintaining the property and improvements" and "operating the business" in order to "cover expenses and improvements" and, he estimated, "to make back my investment" over the next "16 years or so. Ex. 107.

Exhibit 49 shows that John Tate viewed himself and his wife as the owners of the property with goals that did not include making a profit. In his minutes of a meeting with Greg, Wendy, and his financial advisor in October 1999, he listed their goals as preserving it by minimizing the "liability," "operating expenses, and "business" taxes and eventually making "ownership transition upon my/Max's demise as easy and inexpensive as possible" by minimizing "inheritance and estate taxes." His financial advisor suggested forming various entities including "a Limited Liability Company (LLC)," and that "Max & John would own the LLC." Ex. 49. Subsequently, John Tate openly followed the advice about forming the LLCs in his name and Greg and Wendy gratuitously transferred any interest to the entity by quitclaim deed. RP 9/24 at 19-20, 47-48, Ex. 52, 77, 92, 107.

In Exhibit 50 John Tate, in a letter to Greg, apparently considered ways to avoid possible estate taxes, and included an incomplete 1999 Schedule K-1 for T & S, which he described as a "very small business" that he ran "selling miscellaneous items." Ex. 49. Like this one, the other

K-1s were incomplete and not filed by Greg and Wendy, as there was never a partnership return, to which they would be attached. RP 9/25 at 62, 64, 78, Ex. 57, 110. At most these documents were the musings of an elderly man; they were not completed transfers of property.

John Tate's conduct showed that he did not intend to form a business for profit with Greg and Wendy and that he treated the property as his own. He paid for all the expenses and improvements; he reimbursed Greg for any expenses he incurred; and, when the rentals eventually covered these costs, he did not provide an income for himself or Greg. RP 9/24 at 7, 25, 9/25 at 62, 77-78, 119-126, Ex. 1, 57, 93, 100, 105. In addition, he maintained total control over the finances and the property, as shown in his email to Greg, where, in a rage, he refuses to spend "another dime on anything else" until a certain project was completed. Ex. 131.

3. Substantial evidence does not support the finding that Greg and Wendy, through work, acquired a community interest in Tate Lake

Wendy's position that she and Greg earned an interest in John Tate's property through their "uncompensated" labor. The only evidence that Wendy and Greg were co-owners of a business for profit was Wendy's self-serving testimony that "Greg and I are half-owners with John and Maxine Tate" as well as her mother's that "Greg and Wendy and

John and Maxine, were buying out the Bonneys' portion of the ski lake." RP 9/19 at 42, 9/20 at 86.

However, the record abounds with evidence that the only reason John Tate generously bought and funded Tate Lake was to provide Greg and Wendy a place to enjoy a lifestyle built around their enthusiasm for waterskiing, which they shared with their family and friends, who recreated and camped there with them throughout the summers for the last 15 years. RP 9/18 at 157-158, RP 9/19 at 69-71, 75, 87-88, 98, 115-118, 145, RP 9/20 at 54-60, RP 9/21 at 54-56,60, RP 9/24 at 68, RP 9/25 at 71-72, 178-179, 9/26 at 51-52; Ex. 14 at 4, 20, 46. In exchange, John Tate only asked that they maintain and rent the lake in order to cover expenses and to recoup his investment. Ex.107. Their labor was not in exchange for financial compensation; it was for the use and enjoyment of Tate Lake.

4. Even if a partnership existed, Greg and Wendy would not have acquired an interest in John Tate's property

Wendy misconstrues Estate of Kruse, 19 Wn, App. 242, 574 P.2d 744 (1978) which provides six factors to consider – not just one – in determining whether a partner intended his separate real property to become an asset of the partnership. In light of these factors, John Tate intended Tate Lake to remain his separate property, as he paid for all

improvements himself, received all rental income, kept the records, and held it in an LLC in his name, as Greg argued in his opening brief.

5. Wendy and Greg's names on the deed would not support a finding of a community interest

Wendy points to the names on the deed as creating a community property presumption under RCW 64.28.020(2). Even if this is so, the presumption would have been rebutted by the fact that John Tate was the source of the funds for the initial purchase and the buyout of the Bonneys (Marriage of Skarbek, 100 Wn. App. 444, 445, 997 P.2d 447 (2000)) and later that she and Greg made a gratuitous conveyance of the title back to John Tate, as the sole owner of the LLC, by quitclaim deed. Estate of Borghi, 167 Wn.2d 480, 219 P.3d 932, 937 (2009) (execution of a quitclaim deed gratuitously transferring real property is evidence of an intent to transmute it's character.)

Wendy's claim that a partnership existed makes her position even weaker. RCW 25.05.065(4) reads,

> Property acquired in the name of one or more of the partners, without an indication in the instrument transferring title to the property of the person's capacity as a partner or of the existence of a partnership and without use of partnership assets, is presumed to be separate property, even if used for partnership purposes.

Here, the statutory warranty did not indicate anybody's capacity as a partner or the existence of a partnership. Ex. 47. John Tate used only his

funds to buy the property, and, accordingly, it is presumed to be his separate property, no matter how it was used.

K. The trial court mischaracterized Greg's condo

Without citation to the record, Wendy asserts that the condo that Greg already owned "had zero value" at the time of marriage and "was paid off in its entirety during the marriage with community funds." Resp. Br. at 43. This is not in the record; this is from the trial court's unsupported findings. Wendy actually testified that she did not "know the debt equity, what he owed" on his condo and land at Lake Sammamish when they married. RP 9/19 at 100-101. She also did not know how much they borrowed to pay off the loan on the condo; she did not provide documentation; and she ultimately revised her guess to $40,000:

> A. I just remember our mortgage going up significantly, and I recalled it to be a big amount of money but there was a couple different transaction so it was possibly 40-ish thousand possibly instead of 80. I just -- I'm not quite sure on all the documents, but I recall 40 might be. RP 9/19 at 150.

Only Greg provided a clear explanation about buying the condo and paying off the loan against it. He testified that he "bought that condo in 1984 for 54,000," then, in 1997, when they wanted to buy the family home, his father gave him a check for $36,175 "to pay off my condo." RP 9/24 at 119. His account was supported by his father's testimony and a copy of the check itself. RP 9/24 at 109; Ex. 11. Any other supporting

documents were in Wendy's possession, due to the restraining orders she obtained at the start of the case. RP 9/24 at 122.

The condo was undisputedly Greg's separate property when acquired, documentary evidence showed the loan was paid off with separate funds, and courts presume that any increase in its value remains separate. Marriage of Elam, 97 Wn.2d 811, 816, 650 P.2d 213 (1982). The trial court's characterization and, consequently, is valuation and division, was an error as a matter of law and unsupported by substantial evidence.

L. A ski boat and the mobile home were mischaracterized.

It is disingenuous of Wendy to assert that Greg's testimony about the acquisition of the 2000 Custom Craft ski boat and the Liberty mobile home, along with his document showing how he used the proceeds of the sale of his Lake Sammamish land, were insufficient to rebut the community presumption since all other documentation was in her sole possession after she obtained restraining orders against him at the start of the case. RP 9/24 at 122, 9/25 at 46-47.

Wendy did not dispute Greg's account that as a member of the Nautique Promotional Program Team he got a ski boat before the marriage, which he was able to trade in every year for a new model at "no cost" until he had the 2000 Custom Craft boat and trailer. RP 9/19 at 152, 9/25 at 36-37.

And she actually stated, through counsel, that Greg "can have" the "small mobile home which is at Tate Lake." RP 9/26 at 111. This was likely due to the fact that Greg showed that the mobile home was purchased with his separate property proceeds of the sale of his land at Lake Sammamish. RP 9/24 at 119, Ex. 150.

Once Greg established the separate character of these properties, a presumption arose that they remained separate in the absence of sufficient evidence to show an intent to transmute it to community property. Estate of Borghi, 167 Wn.2d 480, 484, 219 P.3d 932 (2009).

M. The VIP loans were not characterized or fairly divided

The trial court's failure to characterize the VIP loans, followed by its decision to stick Greg with both of them, while awarding Wendy the Edge 24' trailer, which was purchased with the borrowed money, was inequitable – and also an apt metaphor for the incredible injustice inflicted on Greg in this matter. CP 185, RP 9/25 at 40-43, RP 9/26 at 112-113.

N. The award of attorney fees should be reversed

The award of fees was not based on intransigence; it was "related to the contempt matters and considering their economic positions after dissolution." CP 179-180, 187, 383. Greg is unable to pay Wendy's fees; not should be, as her fees were paid by her mother. RP 9/19 at 60, 9/21 at 5-6. Wendy's focus on Greg's gross monthly income is misplaced. He has

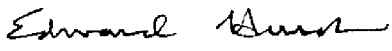
nothing left after paying his expenses, child support, and maintenance from his monthly net income, yet he still has to pay 62% the costs of the kids' extracurricular activities and uninsured medical, reconciliation counseling, and other debts. CP 156, 160-167, 185-188, 382-383, Ex. 78, 85, 86. The amount of the fee award related to the contempt issue was not specified, but it cannot come close to $20,000.

In any event, Greg was not intransigent, especially "as it relates to the Tate Lake issue," since merely taking a position at trial does not justify this finding, which, without more, is insufficient to allow appellate review. Marriage of Greenlee, 65 Wn. App. 703, 708-09, 829 P.2d 1120 (1992). The award of fees should be reversed.

IV. Conclusion

The trial court specifically stated that the marriage and kids were damaged by "the use of Tate Lake" and "domestic violence" by Greg, then proceeded to punish him in its decisions regarding parenting, restraints, maintenance, and property division. This was a manifest abuse of discretion that should be reversed and remanded for fair consideration before a new judge.

Respectfully submitted this 28th day of January, 2014.



Edward J. Hirsch, WSBA # 35807
Attorney for Appellant

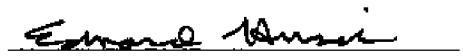
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 28, 2014, I arranged for service of the foregoing Appellant's Response to Cross Appeal and Reply on the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA	___ Facsimile ___ Messenger _X_ Overnight Mail ___ Hand Delivered _X_ Electronic Mail
Catherine W. Smith Valerie A. Villacin Smith Goodfriend, PS 1619 8th Avenue North Seattle, WA 98109	___ Facsimile ___ Messenger _X_ Overnight Mail ___ Hand Delivered _X_ Electronic Mail
Jeffrey A. Robinson Attorney at Law 4700 Point Fosdick Drive NW, # 301 Gig Harbor, WA 98335-1706	___ Facsimile ___ Messenger _X_ Overnight Mail ___ Hand Delivered

DATED at Seattle, Washington this January 28, 2014.



Edward J. Hirsch WSBA # 35807

EDWARD HIRSCH LAW OFFICE PLLC

January 29, 2014 - 9:58 AM

Transmittal Letter

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Case Name: Marriage of Tate

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Comments:

No Comments were entered.

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